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and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 90–43)

REVOCATION BY ACTION OF LAW OF THE CUSTOMS BROKER PERMIT FOR U.S. BROKERS (BTV), INC., IN THE OGDENSBURG CUSTOMS DISTRICT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that on May 15, 1990, pursuant to section 641(c)(3), Tariff Act of 1930, as amended (19 U.S.C. 1641(c)(3)), and Part 111.45 of the Customs Regulations, as amended (19 CFR 111.45), the permit for U.S. Brokers (BTV), Inc., to conduct Customs business in the Ogdensburg District was revoked.

Dated: May 17, 1990.

VICTOR G. WEEREN,
Director,
Office of Trade Operations.

[Published in the Federal Register, May 31, 1990 (55 FR 22136)]

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19 CFR Part 152

(T.D. 90–44)

APPLICATION OF CRITERIA UTILIZED IN DETERMINING THE ELIGIBILITY OF PLANETARIA FOR DUTY-FREE ADMISSION UNDER SUBHEADING 9812.00.20, HTSUSA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final interpretative rule.

SUMMARY: This document gives notice of a change in Customs application to planetaria of the criteria for duty-free admission as articles imported for exhibition by a qualifying institution or State or municipal corporation under subheading 9812.00.20, Harmonized Tariff Schedule of the U.S. Annotated (HTSUSA). Customs has per-

mitted the duty-free admission of planetaria under item 862.10, Tariff Schedules of the U.S. (TSUS), the predecessor in the TSUS of subheading 9812.00.20, even though planetaria are usually imported for the purpose of making presentations rather than serving as the exhibit to be viewed. Planetaria now will not ordinarily qualify for duty-free admission, under subheading 9812.00.20, if they are to be utilized for the making of presentations or demonstrations.

EFFECTIVE DATE: This decision will be effective as to merchandise entered, or withdrawn from warehouse for consumption, on or after July 5, 1990.

FOR FURTHER INFORMATION CONTACT: Paul G. Hegland, Commercial Rulings Division, Office of Regulations and Rulings (202) 566–5856.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In connection with a request for a ruling on the duty-free entry of a planetarium projector for a university, Customs has reviewed its application of the criteria for determining the applicability of item 862.10, TSUS, to planetaria. Customs published notice in the Federal Register on November 18, 1988 (53 FR 46625), proposing a change in its application of these criteria with regard to planetaria and inviting public comments on the proposed change. Three (3) comments were received in response to the notice.

Until replacement of the TSUS by the HTSUSA on January 1, 1989, item 862.10, TSUS, provided for the duty-free entry of articles for permanent exhibition under bond when they are imported by certain types of organizations or for any State or municipal corporation for exhibition. Headnote 1 of Part 5B, Schedule 8, TSUS, which covered articles for permanent exhibition under bond, including item 862.10, stated that the provisions therein "do not apply to articles intended for sale or for any purpose other than exhibition or erecting a public monument * * *." Item 862.10 was similar to predecessor provisions dating back at least as far as 1897 (paragraph 702, Tariff Act of 1897) in providing duty-free entry for exhibition of works of art and similar articles.

Over the years Customs has used certain criteria to determine the eligibility of an article for duty-free entry under item 862.10, TSUS. These criteria, as set forth in Treasury Decision (T.D.) 78–420, published in 12 Cust. Bull. 929, are:

(1) The article must be imported for exhibition itself, another use of it can only be incidental;

(2) The article must be imported by the institution itself or its agent; and

(3) Admission to view the article can be charged only to defray expenses and the article cannot be used in connection with a commercial venture.

In our review of this matter, we found that the application of these criteria to planetaria has not been consistent with that to other articles. The regular use of the planetaria has been considered to be part of the exhibition of the planetaria, apparently because it has been felt that use of the planetaria was necessary for a full and effective demonstration of them. This concept has not been applied to other similar articles. For example, a concert organ to be installed in a music hall was considered as a musical instrument and primarily utilitarian rather than an exhibition object.

We noted, in our review, that planetaria are usually purchased for the purpose of making presentations rather than serving as an exhibit to be viewed. We noted that the institutions importing planetaria and seeking duty-free entry appear to be using the planetaria primarily for research, teaching, testing or classroom study. The primary reason persons attend a "star show" or other planetarium presentation appears to be to view the pictures, images, lights, sounds, etc., produced by the planetarium rather than viewing the planetarium itself. This is so even though the planetarium may be on view during such presentations.

Based on the above-described review of this matter, we concluded that the criteria described in T.D. 78–420 should be applied in the same manner to all articles, including planetaria, for which duty free entry is sought under item 862.10, TSUS. Customs gave notice of its intention to change the treatment of planetaria under item 862.10 in the November 18, 1988, Federal Register notice. In that proposal, we stated that planetaria which are to be utilized for the making of presentations or demonstrations would normally be considered as being imported for that purpose. The observation of the planetaria, in connection with these presentations or demonstrations, would be considered as incidental to the purpose for which they were imported.

Since publication of the November 18, 1988, Federal Register notice, the TSUS has been replaced by the HTSUSA. The subheading of the HTSUSA corresponding to item 862.10, TSUS (subheading 9812.00.20, HTSUSA) and the note of the HTSUSA corresponding to headnote 1 of Part 5B, Schedule 8, TSUS (U.S. Note 1 to Subchapter XII, HTSUSA) are substantively unchanged. When nomenclature in the TSUS remains unchanged in the HTSUSA, administrative decisions under the TSUS are to be considered instructive in interpreting the HTSUSA on a case-by-case basis (House Conference Report on H.R. 3, Omnibus Trade and Competitiveness Act of 1988, 100th Cong., 2d Sess., H. Conference Report No. 100–576; see 134 Cong. Rec. H2021 (daily ed. April 20, 1988)). On this basis, we proceeded with our review of the applicability of subheading 9812.00.20, HTSUSA, to planeteria on the same basis as our review of the applicability of item 862.10, TSUS, to planetaria, discussed above and in the November 18, 1988, Federal Register notice.

SUMMARY OF COMMENTS

Of the three (3) comments received, one (1) favored the proposed change and two (2) opposed the change. The commenter favoring the proposal, a domestic manufacturer of planetaria, asserts that the duty-free importation of planetaria as "exhibits" puts it in an unfair position in competition for planetaria projects in the U.S.

Of the commenters opposing the change, one contends that planetaria are of special interest to persons viewing a planetarium presentation, that "the projection of images or lights by a planetarium is coincident with the exhibition of the projector *per se*," rather than the exhibition of the planetarium being incidental to the presentation of images or lights. This commenter distinguishes planetaria from articles such as the concert organ described in the November 18, 1988, Federal Register notice on the basis that, the commenter claims, during planetarium presentations viewers ask questions about the planetarium and the lecturer will often discuss it. Further, many persons visit a planetarium to see it and hear a lecture about it without seeing a planetarium show.

The other commenter opposing the proposal, a Canadian exporter of large format motion picture projection systems, also contends that its system is often of special interest to viewers of presentations utilizing the system because the system is unique. The commenter states that it has no direct competitors in the U.S. Further, the commenter states that many of its systems are purchased by institutions which receive public funding and that it would be consistent for the Government to support these institutions by allowing importation of the systems on a duty-free basis.

ANALYSIS OF COMMENTS

The commenter supporting the proposal provides no evidence to support its allegation that the current practice results in unfair competition for it with regard to planetaria projects in the U.S. In the absence of such supporting evidence, we do not consider this comment relevant to the proposed change.

The contentions by the second commenter opposing the proposal that it has no direct competition in the U.S. and that, since many of the institutions which purchase its systems are supported by public funding, the Government should allow duty-free admission of its systems also are not considered relevant to the proposal. These considerations are not provided for in the tariff provision and cannot be dispositive of the proposal.

We are unconvinced by the arguments of the commenters opposing the proposal that planetaria are imported for the purpose of being exhibited, rather than being used in the presentation of exhibited material. Descriptive material submitted by the commenters describes or illustrates specially built dome-shaped theaters and special screens and special films for use with the planetaria or spe-

cial projection systems. These theaters and screens are specially constructed for exhibition of the materials *projected* by the planetaria. If the planetaria were only to be exhibited, there would be no necessity for the special construction of uniquely shaped theaters and screens, or for the purchase of special films for projection by them. We conclude that planetaria are imported to be used for the function for which they are designed, i.e., to project astronomical programs for such things as popular-science performances in public observatories, museums, and tourist and recreational centers and to be used as a training and teaching aid in astronomy and navigation.

As stated above, in interpreting subheading 9812.00.20, HTSUSA, Customs has held that the article for which duty-free entry is sought must itself be imported for exhibition; another use of it may only be incidental. The legislative history and stated Congressional intent for the predecessors of subheading 9812.00.20 strongly support this interpretation. (See the Act of September 14, 1959; 73 Stat. 549, consolidating several duty-free provisions into paragraph 1809 of the Tariff Act of 1930, the immediate predecessor of item 862.10, TSUS (paragraph 1809 was not intended to be substantively changed when succeeded by item 862.10; see vol. 2, *Tariff Classification Study, Explanatory Notes* (1960), p. 698). See also, Senate Finance Comm. Rep., *Tourist Literature—Works of Art, Etc.—Importation,* Sen. Rep. No. 665, 86th Cong. 1st Sess. (1959), printed at 1959 U.S.C.C.A.N. 2525.) The published decisions interpreting the predecessors of subheading 9812.00.20 are also consistent with this interpretation (see vol. 1, *Digest of Customs and Related Laws and of Decisions Thereunder,* pp. 1127–1129).

The Customs rulings permitting the duty-free entry of planetaria imported to be used to project or exhibit programs are inconsistent with Customs interpretation of the predecessors of subheading 9812.00.20, HTSUSA. This interpretation by Customs is consistent with the legislative history and Congressional intent described above, as well as published decisions interpreting the predecessors of subheading 9812.00.20. Accordingly, we have reached the following decision.

DECISION

After careful analysis of the submitted comments and further review of this matter, the proposed change in the application of the criteria used in determining eligibility for duty-free admission under the tariff provision now in subheading 9812.00.20, HTSUSA, with regard to planetaria is adopted. Planetaria which are to be utilized for the making of presentations or demonstrations will normally be considered as being imported for that purpose. Such planetaria will not be eligible for duty-free admission as articles imported for exhibition by a qualifying institution or State or municipal corporation under subheading 9812.00.20. Only if planetaria are imported primarily for exhibition themselves (e.g., because they are of

historical value), could they qualify for duty-free admission under subheading 9812.00.20, provided other requirements for such admission are met.

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: May 29, 1990.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, June 5, 1990 (55 FR 22894)]

U.S. Court of Appeals for the Federal Circuit

GENERRA SPORTSWEAR CO., PLAINTIFF-APPELLEE *v.*
UNITED STATES, DEFENDANT-APPELLANT

Appeal No. 89-1652

(Decided May 22, 1990)

Michael S. O'Rourke, and *Patrick D. Gill*, Rode & Qualey, of New York, New York, argued for plaintiff-appellee. With them on the brief were *William J. Maloney* and *Eleanore Kelly-Kobayashi*.

John J. Mahon, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellant. With him on the brief were *Stuart M. Gerson*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office. Also on the brief were *Steven Berke* and *Chi Choy*, U. S. Customs Services, Office of the Assistant Chief Counsel, International Trade Litigation, of counsel.

Vincent James Adduci, II, Adduci, Mastriani, Meeks & Schill, of Washington, D.C., was on the brief for Amicus Curiae, American Fiber Textile Apparel Coalition.

Appealed from: U.S. Court of International Trade.
Judge TSOUCALAS.

Before NEWMAN and MAYER, *Circuit Judges*, and DUPLANTIER, *District Judge*.*

MAYER, *Circuit Judge*.

OPINION

The United States appeals the judgment of the United States Court of International Trade, 715 F. Supp. 1101 (1989), holding that a payment made on behalf of Generra Sportswear Company to a Hong Kong exporter for quota should not have been included in transaction value under 19 U.S.C. § 1401a(b)(1) (1988) and ordering the United States Customs Service to refund excess duties collected. We reverse.

*Judge Adrian Duplantier of the United States District Court for the Eastern District of Louisiana, sitting by designation.

BACKGROUND

Generra Sportswear Company of Seattle, Washington, contracted to purchase 595 women's 100% cotton knit blouses from Bagutta Garment Ltd. of Hong Kong at a price of $6.00[1] each. Bagutta agreed to obtain Type A Transfer quota for category 338/339 at $0.95 per unit.[2] Bagutta obtained quota for the shipment from LCL Manufacturer Co., Ltd. of Hong Kong at $1.28 per unit,[3] the cost of quota having gone up since Bagutta received Generra's purchase order.

Bagutta billed Generra for the merchandise under an invoice in the amount of $3,570 (595 units at $6.00 per unit), and Generra paid Bagutta this amount by a letter of credit. Bagutta billed Generra's Hong Kong buying agent, Generra Sportswear (HK) Ltd., for the quota charges under a separate invoice in the amount of $565.25 (595 units at $0.95 per unit). Generra HK paid Bagutta $15,891.60 for the quota charges for this shipment and others.

The documents accompanying the shipment of blouses when it arrived in Seattle included an export license referencing the transfer of quota, the invoice to Generra in the amount of $3,570, and the invoice to Generra HK in the amount of $565.25. The Customs Service appraised the imported merchandise by combining the amounts stated on the two invoices for a transaction value of $6.95 per unit.

Generra filed a protest, claiming that the quota charges should not have been included in the appraised value. Customs denied the protest, concluding that all monies paid to the seller are includable in transaction value. Generra brought suit in the Court of International Trade challenging the denial of its protest. Ruling on the basis of the pleadings and a stipulation of facts, that court held that the quota charges were not dutiable because they: 1) do not meet the requirement of 19 U.S.C. § 1401a(b)(4)(A) that the payment be made "for imported merchandise"; 2) conferred no benefit on the seller; 3) were not a condition of sale; 4) were not part of the *per se* value of the blouses; and 5) were discernible from the price of the merchandise and treated separately on the invoices. The court thought *United States* v. *Getz Bros. & Co.*, 55 C.C.P.A. 11 (1967), holding that quota charges were not part of "export value" under an earlier statute, governs here.

[1]All dollar amounts are expressed in United States dollars.

[2]As a means of complying with voluntary restraint agreements with the United States, Hong Kong requires that an export license be obtained for each shipment for export. The payment made to obtain the export license is known as a quota charge. *See* 53 Fed. Reg. 46626 (November 18, 1988).

[3]An exporter can obtain an export license by purchasing quota from another party. A Hong Kong government document of record evidences the transfer of quota from LCL to Bagutta.

DISCUSSION

A

The issue on this appeal, whether the quota charges were properly included in transaction value, is a matter of statutory construction. Therefore, we begin our analysis with the language of the statute. *Consumer Prod. Safety Comm'n* v. *GTE Sylvania. Inc.*, 447 U.S. 102, 108 (1980). In pertinent part, 19 U.S.C. § 1401a(b)(1) (1988) provides: "The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to [specified items]."[4] These items must be added to the price actually paid or payable if they are not otherwise included in the price and if they are based on sufficient information. The government does not contend that quota charges are encompassed by any of the enumerated items, but that they are part of the "price actually paid or payable." This is defined in subsection 1401a(b)(4)(A):

> The term "price actually paid or payable" means the total payment (whether direct or indirect, and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.

Section 1401a(b)(3) specifies certain items that are not included in transaction value,[5] if they are identified separately from the price actually paid or payable and from any cost or other item referred to in section (b)(1). Generra does not contend that quota charges are excluded from transaction value by section 1401a(b)(3).

Therefore, because section 1401a(b) does not precisely address whether or not quota payments may be included in transaction value, we determine whether the appraisal was based on a permissible construction of the statute. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Customs' interpretation will be accepted if it is "sufficiently reasonable." *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981). Unless it is clear that Congress' intent was to the contrary, courts normally defer to the agency's construction of the

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[4](A) the packing costs incurred by the buyer with respect to the imported merchandise;
(B) any selling commission incurred by the buyer with respect to the imported merchandise;
(C) the value, apportioned as appropriate, of any assist;
(D) any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States; and
(E) the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller.

[5](A) Any reasonable cost or charge that is incurred for—
(i) the construction, erection, assembly, or maintenance of, or the technical assistance provided with respect to, the merchandise after its importation into the United States; or
(ii) the transportation of the merchandise after such importation.
(B) The customs duties and other Federal taxes currently payable on the imported merchandise by reason of its importation, and any Federal excise tax on, or measured by the value of, such merchandise for which vendors in the United States are ordinarily liable.

statutory scheme it administers. *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 233 (1986); *Chevron*, 467 U.S. at 844.

B

We think Customs' construction of section 1401a(b), that transaction value may include quota charges, is permissible. It is reasonable to conclude that these charges were part of the "price actually paid or payable," defined in subsection 1401a(b)(4)(A) as "the total payment * * * made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller." The total payment from Generra to Bagutta was $6.95 per unit. The term "total payment" is all-inclusive. If Congress had intended to exclude quota payments from transaction value, it could have included them among the explicit exclusions enumerated in section 1401a(b)(3). *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616 (1980).

It is not important that the buyer itself did not pay the seller for the quota charges; the payment was made on behalf of Generra by its Hong Kong buying agent. Further, Generra admits that the "question whether or not the seller benefited from the quota payment is a non-issue in this case." When the payment is made to the seller, it is not necessary to get into whether the seller benefited; the statute is written in the alternative: "to, or for the benefit of, the seller." 19 U.S.C. § 1401a(b)(4)(A).

The thrust of Generra's argument, and the essence of the trial court's reasoning, is that the quota payment was not "for imported merchandise." Generra calls this a factual finding that the quota payment was not "for imported merchandise," and that this finding must be accepted unless clearly erroneous. Quite to the contrary, however, this is not a factual finding; it is a construction of the statute. Generra also says the trial court's "finding" is supported by the stipulated facts. But the parties cannot stipulate to the meaning of a statute; that is a judicial function.

Accepting the stipulated fact that $0.95 of the total payment to Bagutta was for quota charges, it was reasonable for Customs to conclude that the entire payment was "for imported merchandise" within the meaning of subsection 1401a(b)(4)(A). A permissible construction of the term "for imported merchandise" does not restrict which components of the total payment may be included in transaction value. Congress did not intend for the Customs Service to engage in extensive fact-finding to determine whether separate charges, all resulting in payments to the seller in connection with the purchase of imported merchandise, are for the merchandise or for something else. As we said in *Moss Mfg. Co.* v. *United States*, 896 F.2d 535, 539 (Fed. Cir. 1990), the "straightforward approach [of section 1401a(b)] is no doubt intended to enhance the efficiency of Customs' appraisal procedure; it would be frustrated were we to parse the statutory language in the manner, and require Customs

to engage in the formidable fact-finding task, envisioned by [appellant]."

As long as the quota payment was made to the seller in exchange for merchandise sold for export to the United States, the payment properly may be included in transaction value, even if the payment represents something other than the *per se* value of the goods. The focus of transaction value is the actual transaction between the buyer and the seller; if quota payments were transferred by the buyer to the seller, they are part of transaction value. That transaction value may encompass items other than the pure cost of the imported merchandise is reflected in section 1401a(b)(3), governing exclusions from transaction value. If excludable costs or charges are not identified separately from the price actually paid or payable, they are included in transaction value.

It was not necessary for the Customs Service to find that the quota charge was imposed as a condition of sale before considering it part of the "price actually paid or payable" under subsection 1401a(b)(4)(A). Nothing in the statute requires that. On the other hand, that a foreign seller must obtain quota before he can export goods to the United States reasonably indicates that quota payments are part of the "price actually paid or payable for the merchandise when sold for exportation to the United States." 19 U.S.C. § 1401a(b)(1).

That was the case here. Bagutta applied for an export license from the Hong Kong Department of Trade before shipping the blouses to Generra; the license form required Bagutta to name the quota holder, the quota reference and the quantity being shipped in quota units. The export license accompanied the goods out of Hong Kong as proof that Bagutta had quota for the shipment. Indeed, if quota were not a prerequisite to exportation, one wonders why Bagutta paid more than the contract price for quota, taking a loss, or even agreed to obtain quota in the first place.

C

Our conclusion that the appraisal of Generra's shipment of imported merchandise was based on a reasonable construction of section 1401a(b) is not contrary to *United States* v. *Getz Bros. & Co.*, 55 C.C.P.A. 11 (1967), which was decided before that provision was amended by the Trade Agreements Act of 1979.[6] Before the 1979 Act, imported merchandise was appraised on the basis of "export value":

> [T]he export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of

[6]July 26, 1979, Pub. L. 96-39, Title II, § 201(a).

> trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

19 U.S.C. § 1401a(b)(1) (1964); *Getz*, 55 C.C.P.A. at 15. In reviewing Customs' determination of "export value," *Getz* considered whether: 1) the plywood sold by the mills was "freely offered" to all purchasers or whether the quota system limited the class of buyers; 2) as a factual matter, quota generally formed part of the price of the plywood sold by the mills; and 3) there was a single price offered in the principal markets of Japan to all purchasers in the ordinary course of trade for exportation to the United States. By contrast, in determining "transaction value" we look at the actual transaction between Bagutta and Generra. The factors recited above considered by *Getz* in approving an appraisal based on "export value" that excluded quota payments are not relevant to the determination of transaction value.

The critical differences between "export value" and "transaction value" are pointed out in the background material for the Trade Agreements Act of 1979:

> The use of transaction value as the primary basis for customs valuation will allow use of the price which the buyer and seller agreed to in their transaction as the basis for valuation, rather than having to resort to the more difficult concepts of "freely offered," "ordinary course of trade," "principal markets of the country of exportation," and "usual wholesale quantities" contained in existing U.S. law.

S. Rep. No. 96–249, 96th Cong., 1st Sess. 119, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 505. Although the Senate Report predicted that "the practical effects in terms of differences in appraised value appear to be minimal," *id.*, it is clear from the focus on the actual transaction rather than wholesale prices in general that quota charges may be treated differently, depending on the facts, when the appraisal is based on transaction value instead of export value.[7]

CONCLUSION

Accordingly, the judgment of the Court of International Trade is

REVERSED.

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[7] *E.C. McAfee Co.* v. *United States*, 842 F.2d 314, 318 (Fed. Cir. 1988), relied on *Getz* for the proposition that, in a three-tiered distribution system, "if the transaction between the manufacturer and the middleman falls within the statutory provision for valuation, the manufacturer's price, rather than the price from the middleman to his customer, is used for the appraisal." This has nothing to do with whether quota charges may be part of transaction value under the new statute.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

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Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 90–50)

AMERICAN NTN BEARING MANUFACTURING CORP., PLAINTIFF *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, AND ROBERT MOSBACHER, SECRETARY OF COMMERCE, DEFENDANTS AND THE TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 89–06–00338

OPINION

Plaintiff challenges the legality of a scope clarification issued by the International Trade Administration concerning an antidumping duty order covering tapered roller bearings and parts thereof, finished or unfinished, from Japan.

Held: The ITA scope clarification was appropriate and in accordance with law; plaintiff's action is dismissed.

(Decided May 22, 1990)

Barnes, Richardson and Colburn (*Robert E. Burke, Donald J. Unger, Jesse M. Gerson*), for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jane E. Meehan*), for defendant.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., John M. Breen*), for defendant-intervenor.

MUSGRAVE, *Judge:* In this action, plaintiff American NTN Bearing Manufacturing Corporation (hereinafter "ANBM") challenges the legality of a scope clarification issued by the International Trade Administration of the U.S. Department of Commerce ("ITA"). This clarification concerned the scope of an antidumping duty order covering tapered roller bearings ("TRBs") and parts thereof, finished or unfinished, from Japan. *See* 52 Fed. Reg. 37352 (October 6, 1987), *amended*, 52 Fed. Reg. 47955 (December 17, 1987). Plaintiff claims the scope clarification was unsupported by substantial evidence in the administrative record and was otherwise not in accordance with the law. Oral argument was held at the Court on April 25, 1990.

BACKGROUND

In 1987, ITA issued an antidumping duty order covering TRBs and parts thereof, finished or unfinished, from Japan, after finding that those products were being sold at less than fair value ("LTFV") in the U.S. market, *see* 52 Fed. Reg. 30700 (August 17, 1987), and after a subsequent unanimous determination by the U.S. International Trade Commission ("ITC") that an industry in the U.S. was being materially injured by reason of imports of those TRBs and parts thereof. *See Tapered Roller Bearings and Parts Thereof, and Certain Housings Incorporating Tapered Rollers from Japan,* USITC Pub. 2020, Inv. No. 731–TA–343 (Final, Record Document ("R. Doc.") 4 (September 1987), 52 Fed. Reg. 36847 (October 1, 1987).

On May 23, 1988, counsel for ANBM submitted a letter to ITA requesting confirmation that certain imported parts of TRBs (specifically, green machined, or "turned," rings that had not been heat treated during the manufacturing process) were not included within the scope of the antidumping duty order. After soliciting comments upon the requested scope clarification from the interested parties, ITA responded on May 17, 1989, having determined that green turned rings were within the order's purview. *See* Scope Memorandum, R. Doc. 12.

This action followed, with jurisdiction having properly been invoked pursuant to 28 U.S.C. § 1581(c).

DISCUSSION

As with any motion for summary judgment on the agency record, this Court must grant considerable deference to the agency findings of record and may not substitute its judgment for that of the agency's. The evidence supporting the agency's determination need merely fall within what a "reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co., et al.* v. *NLRB,* 305 U.S. 197, 229 (1938); *Matsushita Electric Industrial Co., Ltd., et al.* v. *United States,* 750 F.2d 927, 933 (1984).

The "substantial evidence" standard used by the Court to evaluate whether the agency's findings are supported by law contemplates "essentially a limited review of the agency determination, insuring that the agency conclusions are reasonably drawn from some evidence, more than a mere scintilla, in light of the record as a whole." *Alhambra Foundry, et al.* v. *United States,* 9 CIT 632, 635, 626 F. Supp. 402, 407 (1985).

This limited standard of review should not imply, however, that the agency's findings are absolute, for to so hold would render this Court's function meaningless. The Court's overview is necessary to modify, from time to time, "ITA's overly sweeping view of the authority it is granted" to administer the antidumping laws of the United States. *Olympic Adhesives, Inc.* v. *United States,* No. 89–1367 at 14 (Fed. Cir., March 28, 1990).

With these standards in mind, the Court must decide whether ITA's scope clarification that green turned rings which have not been heat treated are within the scope of the antidumping duty order covering TRBs and parts thereof, finished and unfinished, from Japan, is supported by substantial evidence in the record and was otherwise in accordance with the law. This broad issue encompasses several sub-issues:

> (1) Whether the product description in the petition, investigations and determinations of ITA and ITC was ambiguous;
> (2) If the record is ambiguous, whether ITA may use the criteria outlined in *Diversified Products Corp.* v. *United States,* 6 CIT 155, 572 F. Supp. 883 (1983) to ascertain whether a preexisting product is covered by an antidumping duty order; and
> (3) If ITA may resort to the *Diversified* analysis, whether the agency's application of the *Diversified* factors was reasonable and supported by substantial evidence of record?

(1) *Product Description:*

It is well established that ITA has the authority to clarify and define the scope of an antidumping duty order. *Gold Star Co., Ltd., et al.* v. *United States,* 12 CIT ——, 692 F. Supp. 1382 (1988), *aff'd sub nom. Samsung Electronics Co., Ltd.* v. *United States,* 873 F.2d 1427 (Fed. Cir. 1989). In delineating which products fall within the scope of that order, ITA may consider the petition, the preliminary and final determinations of LTFV and material injury investigations by ITA and ITC, respectively, any previous ITA notices (*i.e.,* notice of initiation of the LTFV investigation), and available ITC publications.[1]

The dispute in this action centers on TRBs, which are machine components used to permit free motion between moving and fixed parts by guiding or moving the parts to minimize friction and wear. *Tapered Roller Bearings and Parts Thereof, and Certain Housings Incorporating Tapered Rollers from Italy and Yugoslavia,* USITC Pub. 1999, Inv. Nos. 731–TA–342 and 346 (Final), R. Doc. 2 (August 1987) at A–3. Four basic parts comprise a TRB: the cone, the tapered rollers, the roller retainer or cage, and the cup. *Id.* at A–4.

The following descriptions of the product subject to the antidumping duty order are contained in the record:

> * * * all tapered roller bearings, tapered rollers and other parts thereof (both finished and unfinished) including, but not limited to, single-row, multiple-row (e.g., two-, four-), and thrust bearings and self-contained bearing packages (generally pre-set, presealed and pre-greased), but only to the extent that such mer-

[1]It is interesting to note that in the Omnibus Trade and Competitiveness Act of 1988 (which amended the trade laws to provide for, *inter alia,* anticircumvention measures), Congress added section 781(e) of the Tariff Act, under which ITC is authorized to give advice to ITA in making its scope determinations under all of the anticurcumvention provisions except minor alternations. S. Rep. No. 71, 100th Cong., 1st Sess. 100, 101 (1987). *See also* Bello, Holmer and Tillman, *Anticircumvention Measures: Shifting the Gears of the Antidumping and Countervailing Duty Laws?,* 24 Int'l Law. 207, 213 (1990).

Had Congress wished to expand this statutory advisory role for ITC to the context of ITA scope *clarifications,* at issue here, it could have so provided in the 1988 amendments, but did not do so. Thus, the authority of ITA, and ITA alone, to clarify scope determinations appears to be absolute.

chandise is not presently covered by an outstanding dumping finding in the United States.[2] Antidumping Duty Petition (August 25, 1986), R. Doc. 1 at 5, 7.

* * * imports of tapered roller bearings 0–4 inches in outside diameter from NTN; imports of all tapered roller bearing sets, cone assemblies, and cups greater than 4 inches in outside diameter; imports of tapered rollers and all other bearing parts; and unfinished tapered roller bearing components [not covered by an outstanding antidumping duty order or finding]. R. Doc. 12 at 2.

* * * tapered roller bearings and parts thereof, currently classified under Tariff Schedules of the United States (TSUS) item numbers 680.30 and 680.39; flange, take-up cartridge, and hangar units incorporating tapered roller bearings, currently classified under TSUS item number 681.10; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use and currently classified under TSUS item 692.32 or elsewhere in the TSUS. *Preliminary Determination of Sales at Less Than Fair Value,* 52 Fed. Reg. 9905, 9906 (March 27, 1987); *Final Determination of Sales at Less Than Fair Value,* 52 Fed. Reg. at 30700; *Antidumping Duty Order,* 52 Fed. Reg. at 37352.

In addition to these product descriptions, the ITC staff report in a related investigation described in detail the four manufacturing stages of TRBs: (1) green machining, or "turning," (2) heat treating, (3) finishing, including grinding and polishing/honing, and (4) assembly. R. Doc. 2, A–8 through A–11.[3] The report also contained a description of "unfinished bearing components;" those being "the cones, cups and rollers that have been green machined and *heat treated* * * * but that require final finishing." *Id.* at A–8 (emphasis supplied).[4] Upon this latter definition alone hinges plaintiff's claim.

Because every other determination lacked any explicit reference to green turned rings that have not been heat treated, plaintiff claims this definition is controlling, and mandates a finding by this Court that green turned rings, that is, cups or cones that have undergone the first of the four manufacturing stages, but have not progressed beyond that stage because they have not been hardened by heat treatment, are not subject to the antidumping order. Plaintiff asserts that green turned rings which have not been heat treated are not within the ITC's definition of "unfinished" parts (those

[2]This reference was to T.D. 76–227, *see* 41 Fed. Reg. 34974 (August 18, 1976), which covered TRB's and certain components from Japan. The Secretary of the Treasury (at that time responsible for administering the antidumping laws) clarified the meaning of "TRB's" to include "inner race or cone assemblies and outer races or cups, either sold as a unit or separately." *Id.* at 34975.

[3]The final Determination by ITC in this case explicitly incorporated by reference the staff report "product information findings" in the related investigation concerning the process used to manufacture TRB's. *See* R. Doc. 4 at 5, n. 6.

[4]This same definition was utilized by ITC in *Tapered Roller Bearings and Parts Thereof, and Certain Housings Incorporating Tapered Rollers from Hungary, the People's Republic of China and Romania,* USITC Pub. 1983, Inv. Nos. 731–TA–341, 344, and 345 (Final) (June 1987), at A–7 through A–8, and *Tapered Roller Bearings and Parts Thereof, and Certain Housings Incorporating Tapered Rollers from Hungary, Italy, Japan, the People's Republic of China, Romania, and Yugoslavia,* USITC Pub. 1899, Inv. Nos. 731–TA–341 through 346 (Preliminary) (October 1986), at A–6.

that are green machined *and* heat treated); an "unfinished" TRB part is claimed to be one upon which only finishing and assembly remain yet to the performed. At any point in the manufacturing process *prior* to that stage, claims ANBM, the product has not become an "unfinished" part. Plaintiff therefore urges this Court to find that green turned rings that have not been heat treated are neither finished nor unfinished parts of TRBs and are exempted from the scope of the order.

Moreover, because the subject product was specifically referenced in the ITC staff report, ANBM claims that no ambiguity existed as to the scope of the order which therefore precluded ITA from examining the factors set forth in *Diversified Products Corp.* v. *United States*, 6 CIT 155, 572 F. Supp. 883 (1983) to resolve the question of whether a product falls within the scope of an ambiguous order.[5]

In opposition, the government claims that neither the petition nor any of the relevant determinations by ITA and ITC *explicitly* referred to green turned rings that are not heat treated. Because of this ambiguity, it is argued that ITA was justified in resorting to the *Diversified* analysis to clarify the scope of the order.

Defendant-Intervenor (the Timken Company, or "Timken"), however, takes the position that the "product definition" contained in the ITC staff report constitutes only one of many elements of the record that ITA may consider in clarifying the scope of an order; more important, it claims, is the petition. As the petitioner in this action, intervenor stresses that its intention, from the very onset of the investigation, was to include *all* TRBs, rollers and parts, whether finished or not, within the scope of the investigation. Because the petition very clearly evinced petitioner's intent to include all TRBs, rollers and parts, whether finished or not, intervenor argues no ambiguity in the record exists, and that ITA was therefore not required to utilize the *Diversified* analysis in making this scope determination.

Alternatively, argues intervenor, the evidence favoring inclusion of all parts (regardless of their state of manufacture) within the order's scope is more than sufficient to support the agency's finding of "ambiguity" and its subsequent application of *Diversified.*

From these competing arguments, the Court must decide whether the relevant sources were ambiguous as to the description of the product subject to the antidumping duty order.

As a preliminary matter, plaintiff attaches too much importance to the passage in the ITC staff report. This definition appeared in the section of the related staff report entitled "the Product," and sub-titled "Description and uses." R. Doc. 2 at A–3. In *this* staff report, as noted earlier, that product description was incorporated by

[5]Those factors are: (1) the general physical characteristics of the product, (2) the expectations of the ultimate purchaser, (3) the ultimate use of the merchandise, and (4) the channels of trade through which the product is distributed.

Kyowa Gas Chemical Industry Co., Ltd. v. *United States*, 7 CIT 138, 140, 582 F. Supp. 887, 889 (1984) added a fifth criterion to the *Diversified* analysis, "The manner in which the product is advertised and displayed." However, courts continue to refer to the "*four*-part" *Diversified* analysis.

reference, but was contained in the "like product" discussion. *See* R. Doc. 4 at 4–5.

An ITC "like product" investigation is conducted for a different purpose than the "class or kind" investigation made by ITA. The latter agency determines the "class or kind" of merchandise that is allegedly being sold at LTFV, *see* 19 U.S.C. § 1673a(c)(2) and 1673e(a)(2) (1988), while the former determines whether a U.S. industry producing a "like product" is injured by reason of the dumped (or in the case of a countervailing duty investigation, subsidized) import. *See* 19 U.S.C. § 1677(4)(A) and § 1677(10) (1988).[6] Because the definition relied upon by ANBM appears in the "like product" discussion of the ITC report, its relevance to ITA's scope determination can only be considered minimal.

However, ITA did cite the ITC staff report definition in the Scope Memorandum, R. Doc. 12 at 3. A plain reading of the definition would seemingly limit "unfinished" components to those that have been *both* green machined *and* heat treated, given that the definition uses the conjunctive rather than the disjunctive. This use may have been inadvertent on the part of the ITC staff, but even if it was intentional, the definition would seem to conflict with the clear language of the petition which includes *all* parts of TRBs, finished or unfinished.

Whether the ITC staff report product definition conflicts with the clear language of the petition begs the question of what green turned rings that have not been heat treated *are*, if they are not unfinished parts. As a matter of logic, all parts must be either "finished" or "unfinished." If a part is not "finished," then it must necessarily be "unfinished." If a part is neither finished nor unfinished, then it cannot be a "part" at all, but rather must be a raw material (or scrap metal). Nowhere in its voluminous memoranda does plaintiff address this very practical point.

Little case law directly addresses the issue presented here. Plaintiff does, however, attempt to fashion some arguments from cases involving related issues. Citing *Gold Star*, 692 F. Supp. at 1384, ANBM relies on the Court's holding that "[t]he ITA has the authority to clarify and define the scope of an antidumping determination * * * however * * * it does not have the authority to change or modify the original determination" to assert that the Scope Memorandum here *changes* and otherwise *modifies* the scope of the antidumping duty order covering TRBs and parts thereof. Absent from this pronouncement is any analysis showing *why* the memorandum here "changes" and "modifies" the order, rather than "clarifies" and "defines" it.

[6] ITC may determine during the course of its investigation that the class or kind of merchandise defined by ITA as being within the scope of ITA's investigation may consist of more than one like product. ITC can reach this result despite the findings by ITA that only one class or kind of merchandise is covered by ITA's investigation. *See, e.g., Certain Valve, Nozzles, and Connectors of Brass from Italy for Use in Fire Protection Systems.* USITC Pub. 1649, Inv. No. 731–TA–165 (Final) (February 1985) (where ITC found seven like products even though ITA had found only one class of merchandise). This may explain why ITC's "like product" inquiry is seemingly more particularized than ITA's "class or kind" investigation.

Plaintiff also cites *Gold Star* for the proposition that where the ITC has so refined or refined or specifically defined a term used throughout an investigation, this Court will accept that definition as controlling. However, *Gold Star* makes no such sweeping generalization, nor was the definition on which plaintiff's case rests used "throughout" the investigation involved here. In *Gold Star*, color television receivers, complete or incomplete, from Korea were subject to an antidumping duty order. "An incomplete receiver was characterized in the ITC investigations as: 'a color picture tube ["CPT"] and a printed circuit board ["PCB"] or ceramic substrates with components assembled thereon * * *.'" 692 F. Supp. at 1384. Plaintiff requested clarification from ITA as to whether *separately* imported subassemblies and components such as printed circuit boards and color picture tubes were within the scope of the order. After considering comments which referenced excerpts from documents used by ITA in making its LTFV determination, and by ITC in making its material injury determination, ITA responded affirmatively. Plaintiff challenged that clarification. The Court held that television components and subassemblies were of the class or kind of merchandise properly included within the scope of the order, and affirmed ITA's clarification.[7]

The Court reached its finding based partly upon the definition of "incomplete receivers" found in the ITC determinations. *Id.* at 1385. In that respect, *Gold Star* is factually similar to this case, where the ITC defined "unfinished parts." However, the question of "ambiguity," of primary importance here, was not at issue in the *Gold Star* order.

The Court was concerned by the possibility of plaintiffs' circumventing the order if separate shipments of subassemblies, subsequently assembled together, were allowed to escape the imposition of antidumping duties: "[t]he Court will not allow such a transgression upon the antidumping duty laws of this country." *Id.*

Not only does the present case not involve a "class or kind" challenge, it does not involve subassemblies. This fact lessens *Gold Star's* influence on the outcome of this case, since the basis for that decision was anticircumvention.[8] ("If the Court were to allow separate importations of PCBs and CPTs [subsequently assembled to-

[7] *Mitsubishi Elec. Corp., et al.* v. *United States*, 12 CIT ——, 700 F. Supp. 538 (1988), *aff'd*, No. 88–12–01858 (Consol.) (Fed. Cir., March 15, 1990) focused on a similar issue: whether discrete subassemblies dedicated exclusively for use in cellular mobile telephones which had a value of $5 or more were included within the scope of an antidumping order covering cellular mobile telephones and subassemblies imported from Japan. The petition in that case specifically noted the domestic industry's desire to prevent Japanese manufacturers from circumventing the order "by creating the facade of manufacturing cellular mobile telephones in the United States; when in fact that 'manufacturing' uses kits * * * or mobile telephones in the United States; when in fact that 'manufacturing' uses kits * * * or mobile transceivers * * * that are made in Japan." 700 F. Supp. at 542.

In affirming ITA's scope determination that subassemblies valued at $5 or more *were* within the scope of the order, the Court emphasized that the petitioner had, in the petition and during the investigation, clearly evinced its intent and purpose to include discrete subassemblies within the scope of the investigation, *id.* at 533, for the reasons noted above. Thus, anticircumvention seems to have been the primary factor behind the Court's decision. While such a factor might play a role here, it does not appear to have been the foremost concern.

[8] The pleadings made several arguments concerning anticircumvention. For instance, the government claims that even if green turned rings which have not been heat treated are more "unfinished" than other parts, a finding that those parts are outside the scope of the order cannot follow. Such an artificial distinction, argues defendant, would virtually invite foreign TRB part manufacturers to circumvent the order.

Continued

gether] to escape the purview of the [antidumping] order, the domestic industry would continue to suffer the injurious consequences of dumped goods." *Id.)* Rather, the issue in this case focuses on what point in the manufacturing process materials become "unfinished parts" subject to the order.

Also cited by plaintiff is *Royal Business Machines, Inc.* v. *United States,* 1 CIT 80, 507 F. Supp. 1007 (1980), *aff'd* 69 CCPA 61, 669 F.2d 692 (1982). In that case, the Court was presented with a jurisdictional issue resulting from plaintiff's failure to properly contest the suspension of liquidation of certain portable electric typewriters imported after the imposition of an antidumping duty order. Rather than file a 28 U.S.C. § 1581(c) action, plaintiff instead requested confirmation from ITA that its imported products had not been included within the scope of the order. Plaintiff felt the order indicated that its imports were not included therein; plaintiff thus maintained it was not aggrieved by any final agency determination needed to institute judicial review of the order. When ITA determined that plaintiff's imports *were* included within the scope of the order, plaintiff instead filed a § 1581(i) action seeking to enjoin "retroactive" modification of the order.

In its analysis in *Royal,* the Court observed that "[e]ach stage of the statutory proceeding maintains the scope passed on from the previous stage."[9] 507 F. Supp. at 1014. Plaintiff uses this observation as the basis for claiming that at every stage of the administrative proceeding, the investigations did not extend beyond unfinished parts or components, which were defined as green turned rings that have been heat treated. At no stage in the proceedings did petitioner Timken object to the definition.

Presumably, ANBM meant to argue that because Timken made no objection to ITC's staff report definition of "unfinished parts" during the investigations, they are foreclosed from objecting at this juncture. The Court cannot accept this proposition. Requiring petitioners to possess the foresight to object to definitions that could possibly include obscure products or thereafter accept those products as excluded from the order would be tantamount to requiring petitioners to specify, by name, the universe of articles that might possibly be covered by the order they seek. Either scenario would be unreasonable and unworkable.

Plaintiff also uses *Royal* to argue that the previous determinations all utilized the ITC's definition, and that since the final order must express the result of the previous determinations without al-

Timken also makes the policy argument that *all* unfinished parts were included within the scope of the investigation because of the concern that third-party manufacturers were evading the 1976 antidumping finding, noted earlier at fn.2.

However, these arguments, while relevant, would assume more importance if this dispute were an anticircumvention action bought pursuant to 19 U.S.C. § 1677j (1988) (one of the new remedies added by the 1988 amendments to the Tariff Act, *see* discussion at fn.1.

[9]The Court went on to hold that plaintiff's action was ultimately directed at the basis of the final determinations and not at the final order, and plaintiff should have brought an action under 28 U.S.C. § 1581(c). 507 F. Supp. at 1015. Because plaintiff failed to commence its action within the statutory 30-day period, the Court was without jurisdiction to hear the claim. *Id.*

terations (as noted above; 507 F. Supp. at 1014), the order must be read as not including green turned rings that have not been heat treated. It is clear, however, that the scope passed on from stage to stage during the course of these determinations was simply "parts or components, finished or unfinished." The ITC staff report definition did not appear in this determination until September, 1987, one year after the scope of the investigation was announced. *See* 51 Fed. Reg. at 33286. Thus, that definition cannot have been passed on from the initial stage of the investigation to each succeeding stage if it was not even incorporated until twelve months after the initiation of the investigation.

Finally, plaintiff contends that because green turned rings were specifically excluded from the scope of an antidumping duty investigation in the petition in *Antifriction Bearings—Other than Tapered Roller Bearings—from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom,* 54 Fed. Reg. 18992 (May 3, 1989), the rings are distinguishable from other "unfinished" parts at issue in this case. Since they are distinguishable, green turned rings that have not been heat treated should fall outside the ambit of the order covering unfinished parts, argues ANBM.

To the contrary, defendant asserts that because green turned rings which have not been heat treated were specifically excluded from the underlying petition in the antifriction bearing case, so too could petitioner have requested exclusion of those rings from *this* petition. Because such a request was not made, the government maintains that the rings fall within the order's scope.

Notwithstanding the fact that separate, unrelated antidumping investigations by ITA are irrelevant to these proceedings, the government's point is well-taken. If the petitioner in the antifriction case specifically requested that a particular item be exempted from the scope of those investigations, then the petitioner in this case (Timken) could have likewise made a specific request that green turned rings which have not been heat treated be excluded from the antidumping investigations.[10]

However, as noted earlier, requiring petitioners (as well as ITA) to specify, by name, the entire range of articles which are or may be in the future excluded from the coverage of an investigation might present an impossible task.

Defendant-intervenor makes a persuasive case for absence of ambiguity based upon its contention that from the filing of its initial petition to the present litigation, all parts, in every stage of production, were included in the investigation and orders. The Court finds, however, that the ITC staff report language defining unfinished

[10]The significance of this point may be lessened by the fact that the petitioner in the antifriction bearing case, the Torrington Company, had interests antithetic to those of petitioner-intervenor here. Timken produces bearing-grade steel, which it uses to manufacture TRB's. Torrington, however, does not possess steel-making capacity and must purchase bearing-grade steel from domestic and foreign sources. Thus, as parties with divergent concerns, the two companies could hardly be expected to draft their petitions in precisely the same terms, even if the product at issue is the same.

parts as those which have been heat treated varies from the language of the petition.

In addition, plaintiff itself requested clarification from the governmental authorities concerning the scope of the order. Had the order been unambiguous, as plaintiff maintains, recourse to a clarification request would not have been necessary.

Thus, ambiguity does arise, and the scope determination to clarify this ambiguity was clearly within the discretion and the authority of ITA.

(2) *Use of Diversified Criteria:*

Plaintiff maintains that ITA's resort to the factors outlined in *Diversified Products Corp.*, 572 F. Supp. 883,[11] to clarify the scope of the order was not warranted. ANBM asserts that only new products developed *after* an order issues can be subject to the *Diversified* analysis. Because green turned rings were not new products developed *after* imposition of the order, ANBM claims ITA erred in analyzing the subject merchandise according to the *Diversified* factors.

The government instead claims that ITA can always rely on the *Diversified* factors to determine whether a pre-existing product is covered by an ambiguous antidumping duty order.

Both parties rely on *Floral Trade Council of Davis, California* v. *United States*, 13 CIT ——, 716 F. Supp. 1580 (1989) to support their positions. In that case, the Court upheld ITA's determination that daisies were not within the scope of antidumping duty orders covering certain fresh-cut flowers. ITA reached that conclusion primarily because "daisies" were not discussed in the petition as a product to be investigated. *Id.* at 1582.

As secondary reasoning, and "in an effort to be comprehensive, ITA [applied] *the analysis applicable to newly developed products* to this case of any existing product." *Id.* (Emphasis supplied.) While finding this reasoning unnecessary (because the agency could have relied exclusively on the product description in the petition to reach the same result), the Court held that ITA's application of the *Diversified* criteria was nonetheless supported by evidence in the record. *Id.* [12]

The government acknowledges that while ITA ordinarily utilizes *Diversified* to determine whether a *new* product is within the class or kind of merchandise covered by the order, *see Kyowa Gas Chemical Industry Co., Ltd.* v. *United States*, 7 CIT 138 (1984), it argues that ITA may also apply the four criteria when the agency finds ambiguity in the record as to whether the pre-existing product was covered by the antidumping duty order.

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[11] For the purposes of this case, *Diversified* merely established the factors ITA may consider in clarifying the scope of an antidumping duty order.

[12] The Court also noted, in a footnote, that "[t]his type of analysis may be of use to ITA in making scope determinations regarding pre-existing products, especially if ITA is attempting to interpret an ambiguous petition." 716 F. Supp. at 1582, n.3.

Plaintiff relies on language contained in ITA's statement before the United States-Canada Free Trade Agreement Binational Review Panel to counter the government's arguments. ITA, it is argued, explicitly limited its use of the *Diversified* criteria to situations involving new products: "[f]or purposes of clarifying pre-existing orders, the case [*Diversified*] is limited to situations involving new products." Brief of the Investigating Authority, Review No. USA–89–1904–02, August 29, 1989, at 11–12.

However, that statement also contains a proviso that *Diversified*, for purposes of interpreting pre-existing findings and orders, is *normally* limited to cases involving new products. *Id.* at 13. Thus, ITA did not rule out using the *Diversified* analysis in other limited circumstances. It would seem, then, ITA recognizes that the chief applicability of *Diversified* lies with newly developed products, but in cases where the record contains an ambiguous product description, it may also be useful to apply that analysis as well.

Plaintiff further cites the reference in ITA's statement before the U.S.-Canada Free Trade Agreement Binational Review Panel to the recent legislation codifying the *Diversified* criteria, *see* 19 U.S.C. § 1677j(d)(1) (1988):[13] "the amendment is explicitly limited to merchandise developed after an order is issued." Brief of the Investigating Authority at 32, emphasis in original. However, in that same paragraph, ITA also notes that "[t]he recent legislation codifying the *Diversified* criteria * * * confirms that they are *primarily* suited to determining whether new products are within the scope of an outstanding antidumping duty order * * *" *Id.* (Emphasis added.) This passage does not indicate that the criteria apply *exclusively* to newly developed products; it merely stresses this is their *primary* use.

In addition, as defendant-intervenor properly notes, the Conference Report accompanying the legislation codifying the *Diversified* factors, Section 1321(d), Pub. L. 100–418, 102 Stat. 1192, indicates that none of that section's provisions were intended to call into question the past authority of ITA to make scope determinations. *See* S. Rep. No. 576, 100th Cong., 2nd Sess. 601 (1988). Thus, the legislative history indicates that the amendment was not intended to foreclose ITA from applying *Diversified* in conformity with its past

[13](d) Later-developed merchandise

(1) In general

For purposes of determining whether merchandise developed after an investigation is initiated under this subtitle or section 1303 of this title (hereafter in this paragraph referred to as the "later-developed merchandise") is within the scope of an outstanding antidumping or countervailing duty order issued under this subtitle or section 1303 of this title as a result of such investigation, the administering authority shall consider whether—

(A) the later-developed merchandise has the same general physical characteristics as the merchandise with respect to which the order was originally issued (hereafter in this paragraph referred to as the 'earlier product'),

(B) the expectations of the ultimate purchasers of the later-developed merchandise are the same as for the earlier products,

(C) the ultimate use of the earlier product and the later-developed merchandise are the same,

(D) the later-developed merchandise is sold through the same channels of trade as the earlier product, and

(E) the later-developed merchandise is advertised and displayed in a manner similar to the earlier product.

practices. The amendment arose only to provide ITA with a statutory mechanism for clarifying whether later-developed merchandise is covered by an existing antidumping duty order, since apparently the great majority of past applications had sought to remedy that specific problem. The amendment does not, however, foreclose ITA from invoking *Diversified* in similar, but not exactly analogous, situations.

Based on this legislative history and the decision in *Floral Trade*, the Court cannot adopt the position advanced by plaintiff that *Diversified* applies *only* to new products developed after an antidumping duty order issues. Such an inflexible standard, while producing a bright line to aid in litigation of the complex issues embedded in the antidumping laws, might also have the effect of unjustly precluding viable claims.

The Court notes that past practice supports defendant's argument that *Diversified* can be used to clarify the scope of an antidumping duty order as it applies to preexisting products, when the order and its accompanying administrative record are ambiguous. The Court therefore holds that while the use of *Diversified* may be beneficial to ITA in clarifying the scope of an ambiguous order, the agency is not required to apply the *Diversified* factors to a preexisting product, nor was ITA necessarily constrained to utilize the *Diversified* analysis here. Where the order is ambiguous, ITA may resort to whatever criteria it determines will resolve the ambiguity. If the agency chooses to apply the *Diversified* factors, as ITA did here, that application is a legitimate exercise of the discretion and authority of ITA.

(3) *Application of Diversified Criteria:*

Because ITA was justified in applying the four *Diversified* criteria to clarify the ambiguous order, the Court must ascertain whether ITA's application was reasonable and supported by substantial evidence of record. In analyzing these criteria, it should be noted that ITC found neither finished nor unfinished parts or components have any other commercial use other than as parts of TRBs. R. Doc. 2 at A–8; R. Doc. 4 at 6.

Additionally, ITC noted that while each step of the production process of a TRB is necessary (i.e., green machining and heat treatment), importing the product prior to a certain stage in the manufacturing process does not alter the ultimate use of the part or component being manufactured or finished. R. Doc. 4 at 7.

a. *General Physical Characteristics:*

Applying the first of the *Diversified* criteria, ITA noted that "the general physical characteristics of a green turned ring are similar to an unfinished part * * *" R. Doc. 12 at 3. Plaintiff disputes this finding, arguing that green turned rings do not share the same general physical characteristics as unfinished parts because they have not been heat treated. This heat treatment effects a significant

change in the physical properties of green turned rings, claims ANBM, thus distinguishing them from unfinished parts.

Plaintiff relies on *Ferrostaal Metals Corp.* v. *United States*, 11 CIT 470, 664 F. Sup. 535 (1987) to advance the proposition that heat treatment effects a "substantial transformation" of materials on which it is performed, thus necessitating a finding that green turned rings which have not been heat treated possess significantly different physical characteristics than unfinished parts, which are further along in the manufacturing process.

Ferrostaal concerned cold rolled steel sheet which was subjected to a particular heating process called "annealing." From this lone factual similarity (the metallurgical effects of the heat treatment process) plaintiff seeks to extrapolate the Court's reasoning to the circumstances of this case. However, a customs case involving the controlled heating and cooling of steel sheet in a furnace cannot easily be reconciled with an antidumping case involving green turned rings that have not been heat treated.

As *Ferrostaal* noted, the concept of "substantial transformation" is used for identifying the country of origin of imported merchandise for purposes of determining the dutiable status of that merchandise. 664 F. Supp. at 537. The term is of primary importance in cases involving country of origin markings, *see, e.g., Nat'l Juice Products Ass'n* v. *United States*, 10 CIT 48, 628 F. Supp. 978 (1986), and cases involving American goods returned, *see, e.g., Upjohn Co.* v. *United States*, 9 CIT 600, 623 F. Supp. 1281 (1985). In the context of determining the scope of an antidumping duty order, "substantial transformation" has little legal significance.

Thus, ITA's finding that the general physical characteristics of a green turned ring are similar to those of an unfinished part is supported by substantial evidence in the record and was otherwise in accordance with the law.

b. *Expectations of the Ultimate Purchaser:*

ITA held that the expectations of the ultimate purchaser concerning green turned rings do not differ from those of the ultimate purchaser of unfinished or finished parts of TRBs because green turned rings are intended to be components of finished TRBs. R. Doc. 12 at 3. The Scope Memorandum also referenced ITC's finding that only a very small residual market exists for unfinished components.[14] R. Doc. 12 at 3.

Given that green turned rings which have not been heat treated have no alternative use other than as parts of TRBs, and that the negligible residual market for unfinished components is the same as for finished components (both markets consisting of TRB producers), plaintiff's argument that the expectations of the ultimate purchaser of green turned rings are different from those of purchasers

[14]This market was found to be "very small" and "not significant," consisting of "tapered roller bearing producers who finish the components into complete bearings or who purchase to alleviate short-term material shortages." R. Doc. 4 at 28, n.2 (additional views of Vice-Chairman Brunsdale).

of unfinished parts cannot be supported by the facts. The expectations of the ultimate purchaser are the same for green turned rings and all other components; they are expected to function as part of a complete bearing unit after all necessary manufacturing and assembly operations are performed.

Accordingly, ITA's determination that the expectations of the ultimate purchasers concerning green turned rings do not differ from those of the ultimate purchasers of TRB parts and components, both unfinished and finished, is supported by substantial evidence in the record and was otherwise in accordance with the law.

c. *Use* and d. *Channels of Distribution:*

ITA found that "the ultimate use of the green turned ring is almost exclusively as a component of a tapered roller bearing.[15] R. Doc. 12 at 4, and that "the green machined ring [which has not been heat treated] moves through the same channel of trade as either an unfinished component or a completed TRB." *Id.*

ANBM's only challenge to this finding rests on their assertion that the expectations of the ultimate purchasers are different; "consequently, the *use* and *channels of distribution* of non-heat treated green machined rings are different from those of heat treated green turned rings." Plaintiff's Memo at 39.

However, as noted above, the premise for this argument cannot be sustained by the findings of record, since the expectations of the ultimate purchaser for green turned rings and the expectations of the ultimate purchasers for finished and unfinished TRB parts are the same. Therefore, ANBM's position on these two points cannot be upheld. ITA's findings regarding the use and channels of distribution of green turned rings is supported by substantial evidence in the record and was otherwise in accordance with the law.

CONCLUSION

ITA's clarification of the scope determination covering TRBs and parts thereof, finished and unfinished, from Japan, is supported by substantial evidence in the record and was otherwise in accordance with the law.

[15]The "negligible residual market" noted earlier presumably prevented ITA from categorically finding that green turned rings had *no* other use than as a TRB component.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/151 5/15/90 Aquilino, J.	Belfont Sales Corp.	85–3–00341	716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43, 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.
C90/152 5/15/90 Aquilino, J.	D & M Watch Corp.	85–4–00501	716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43, 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.
C90/153 5/15/90 Aquilino, J.	Dynamic Supply, Inc.	85–2–00227	716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43, 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.
C90/154 5/15/90 Aquilino, J.	Grundig Electric Co.	85–4–00530	716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43, 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.
C90/155 5/15/90 Aquilino, J.	World Forum Watch	85–3–00443	716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43, 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.

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